UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

YETI Coolers, LLC, **Plaintiff,** **v.** **Kaiser Group Inc., d/b/a Thermo-Steel, d/b/a Vino2Go, d/b/a Brew2Go, Titan Custom Products, Inc., The Allen Company, d/b/a Allen Color Craft, Ad Ideas Of Wisconsin, Inc., d/b/a Zipline, d/b/a Image Innovators, Zibo Tiee International Co. Ltd., Zhejiang Wuyi The Drinkware Co. Ltd., Benner China and Glassware of Florida, Inc.,** **Defendants.**	**Case No. 1:15-CV-725-RP** **(Consolidated with 1-15-CV-775 RP)** **(Consolidated with 1-15-CV-887 RP)** **(Consolidated with 1-15-CV-888 RP)** **(Consolidated with 1-16-CV-142 RP)** **Jury Trial Demanded**

YETI'S MOTION TO: (1) DISMISS THE KAISER DEFENDANTS' ANTITRUST COUNTERCLAIM; AND (2) SEVER AND STAY THE TORTIOUS INTERFERENCE AND ANTITRUST COUNTERCLAIMS

Plaintiff YETI Coolers, LLC ("YETI") respectfully moves the Court to (1) dismiss the Kaiser Defendants'[1] antitrust counterclaim (22nd Counterclaim); and (2) to sever and stay their antitrust counterclaim, to the extent it is not dismissed, as well as their tortious interference counterclaims (20th – 21st Counterclaims).

[1] The Kaiser Defendants include (1) Kaiser Group Inc., d/b/a Thermo-Steel, d/b/a Vino2Go, d/b/a Brew2Go ("Kaiser"); (2) Titan Custom Products, Inc. ("Titan"); (3) The Allen Company, d/b/a Allen Color Craft ("Allen"); (4) Ad Ideas Of Wisconsin, Inc., d/b/a Zipline, d/b/a Image Innovators ("Ad Ideas" or "Zipline"), and (5) Benner China and Glassware of Florida, Inc. ("Benner").

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I. INTRODUCTION

YETI filed this case to stop Kaiser Defendants from infringing YETI's trade dress and trademark rights through their sale of copies of YETI's distinctive tumblers. To distract the Court from their copying of YETI's tumblers, the Kaiser Defendants filed twenty-two (22) counterclaims against YETI, including claims for alleged trade dress infringement, tortious interference with contract and antitrust violations. All of Kaiser's claims are without merit and some are based on unsupported allegations and facts.

One of Kaiser's counterclaims, however, is based on no facts, or at least not sufficient facts to support the elements of the claims, and should be dismissed. Kaiser's 22nd Counterclaim alleges violation of Section 3 of the Clayton Act based on what Kaiser calls an alleged "illegal tying" arrangement. However, the Kaiser Defendants do not plead the necessary ***elements*** of an illegal tying claim, much less any ***facts*** to support those elements. For example, the Kaiser Defendants fail to plausibly plead at least: (1) that the alleged tie had an anticompetitive effect on the alleged tied market; (2) that YETI has sufficient market power in the alleged tying market; or (3) that YETI's alleged acts affect a substantial volume of commerce in the alleged tied market. Because their antitrust counterclaim satisfies neither the pleading standards of *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) nor the applicable substantive pleading standards of such a claim, the Court should dismiss it under Rule 12(b)(6), or at a minimum stay it.

In addition, the Kaiser Defendants also assert two tortious interference counterclaims that are premised on alleged "baseless assertions [by YETI] of trade dress infringement" against various companies. (ECF 67 at ¶¶ 161, 168). Because these counts are premised on the Kaiser Defendants' claim that YETI's assertions of trade dress infringement are baseless, these counts should be resolved only after the trade dress issues have been resolved. The Court should thus sever and stay these counterclaims.

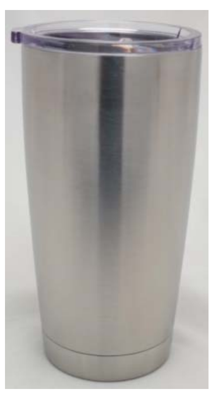
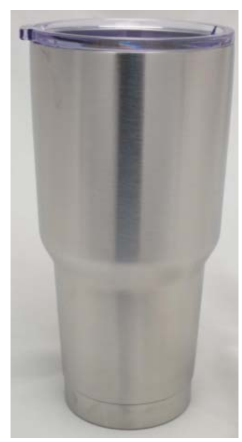
II. BACKGROUND OF THE PARTIES' DISPUTE

A. YETI's distinctive Rambler™ tumblers

YETI created a series of premium, heavy-duty insulated drinkware products with purposefully distinct designs. Two of the drinkware products at issue here are YETI's 30 oz. Rambler™ tumbler and its 20 oz. Rambler™ tumbler.

B. Kaiser's "new" accused tumblers are copies of YETI's tumblers and are causing widespread marketplace confusion

Kaiser, Kaiser's retailers (Ad Ideas, Allen, Benner, Titan ((collectively the "Kaiser Retailers")) and Kaiser's manufacturers (Zibo Tiee International Co. Ltd., and Zhejiang Wuyi The Drinkware Co. Ltd.) recently began selling copies of YETI's 30 oz. and 20 oz. Rambler™ tumblers in violation of YETI's trade dress right. YETI's and Kaiser's products are illustrated in the figures below. (*See* Declaration of J. Pieter van Es (filed concurrently) ("van Es Dec.") at Exs. 6-7).

			
YETI 20 oz. Rambler™ Tumbler	**Kaiser's Infringing "20 oz. tumbler**	**YETI 30 oz. Rambler™ Tumbler**	**Kaiser's Infringing 30 oz. tumbler**

While Kaiser makes unsubstantiated claims that it owns trade dress rights in these tumbler designs, in reality, the marketplace reflects that consumers associate these tumbler designs with YETI, not Kaiser. In addition, Kaiser's copying is confusing consumers because they associate

these designs with YETI. For example, publically available reviews for Kaiser's infringing products provide many statements illustrating the secondary meaning in YETI's designs and actual confusion as a result of Kaiser's infringement and dilution.

Two Stars
By Karen Doss on March 12, 2016
Size: 30 oz | Verified Purchase
I thought I was ordering a Yeti! Sent it right back

We got it yesterday and used it and I am very disappointed in the product and am even more disappointed in ...
By Michael G. Nix on February 23, 2016
Size: 30 oz | Verified Purchase
I was fooled. I thought I was ordering a yeti. We got it yesterday and used it and I am very disappointed in the product and am even more disappointed in myself for falling for the impostor. I would ask for a refund but the seller didn't miss-represent the product, It was my mistake and my ignorance thinking it was a yeti. It definitely doesn't hold ice overnight like my yeti does. If you want a yeti make sure it has the yeti name on it. This product doesn't come close.

Examples of marketplace confusion by Kaiser's infringing tumblers (van Es. Dec. at Exs. 8-9).

Other reviews similarly reflect market place confusion, such as: "I thought I was buying a yeti cup but it's not"; "Thought I was purchasing a Yeti 30 ounce"; "I was in belief I was getting a Yeti cup"; "I thought it was a yhetti"; and "[M]y brother has the same one and it has the yetli logo on bottom and lid and mine doesn't … I question whether I got a true Yetti". (van Es. Dec. at Exs. 8, 10-13).

C. Kaiser's unsubstantiated claim of prior trade dress rights fails, and is belied by statements identifying the infringing products as "New"

As mentioned above, in response to YETI's Complaint, Kaiser claims that it created the accused tumblers ***before*** YETI and therefore Kaiser owns the trade dress rights in YETI's tumbler design. (ECF No. 67 at ¶ 52). For example, Kaiser alleges that the following product was sold by Kaiser in 2008, prior to YETI's introduction of its stainless steel tumblers. (ECF No. 67 at ¶¶ 40-41):

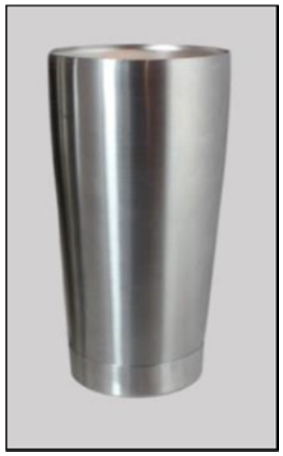
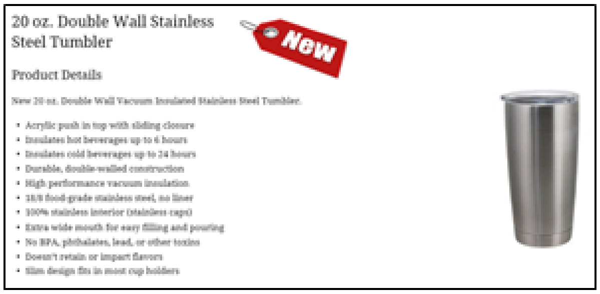


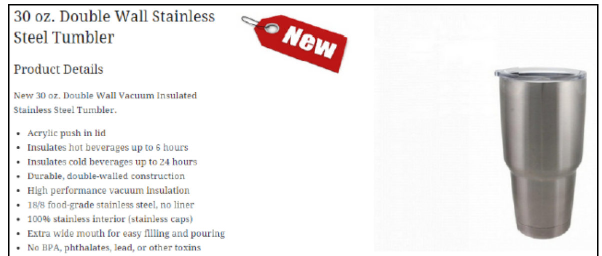
Image from Kaiser's Counterclaims for Which Kaiser Has Provided No Substantiation

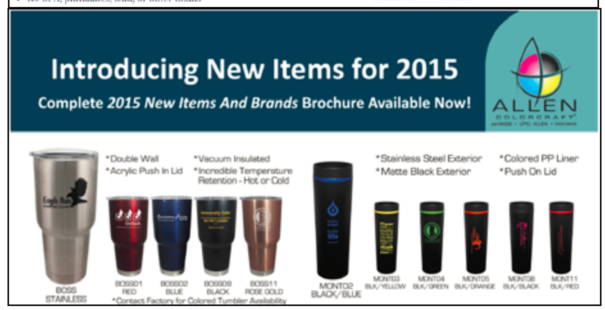
Kaiser has produced ***no evidence***, however, showing that it sold the above product, or any accused product, before YETI introduced its purposefully distinct stainless steel tumblers. YETI has repeatedly asked Kaiser for any information—documents, catalogs, samples, sales data or anything else—that would support Kaiser's claims that it sold this or any of its accused products before YETI. Kaiser has produced nothing. On the other hand, Kaiser attached a 2004 catalog to its originally filed Counterclaims (ECF No. 14),[2] which does not show the above product or any other accused product. Neither do the other few catalog pages Kaiser produced. Kaiser's website also does not show the above product and did not show Kaiser's copy of YETI's tumbler until well after YETI introduced YETI's tumbler.

In addition, when Kaiser and its retailers began selling their YETI knock-off tumblers, they announced the knock-offs as "NEW" as shown below. (van Es Dec. at ¶¶ 4-7, 10-12, Exs. 1-5):

[2] Kaiser's Answer and Affirmative Defenses and Counterclaim filed May 9, 2016 (ECF No. 67) reference but do not include a copy of this catalog. (ECF No. 67 at ¶ 28 (referencing "Exhibit A" that is not attached)).







Kaiser's Infringing Products Advertised as "NEW" by Kaiser (www.thermo-steel.com) and Ad Ideas (www.ziplinepromo.com)	Kaiser's Infringing Products Advertised as "NEW" By Kaiser (www.thermos-steel.com) and Allen (www.allenmugs.com)

When YETI's counsel informed Kaiser's counsel of these announcements, a day later when YETI's counsel again visited the websites with the announcements, several of them were gone. (van Es Dec. at ¶¶ 8-9). Kaiser has yet to produce the former announcements in discovery despite promises to do so. Luckily, YETI had previously saved some of the announcements.

Putting aside Kaiser's litigation maneuvering, YETI will prevail even if Kaiser ultimately establishes that it sold tumblers before YETI. There is nothing to suggest that Kaiser's mystery tumblers, even if they do exist, embody YETI's trade dress asserted in this case. Nor is there anything to suggest that Kaiser can prove sufficient sales and market presence to establish protectable trade dress rights in ***whatever*** it sold before YETI.

III. ARGUMENT

A. The Court should dismiss the Kaiser Defendants' antitrust counterclaim (22nd Counterclaim)

The Court should dismiss the Kaiser Defendants' antitrust counterclaim because it fails to satisfy even the most basic pleading legal requirements.[3]

1. The Kaiser Defendants fail to state a "plausible" claim for relief

To survive a Rule 12(b)(6) motion to dismiss, the Kaiser Defendants' counterclaim must "contain sufficient factual matter, accepted as true, to state a claim to relief that is ***plausible*** on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (emphasis added). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" and courts cannot "accept as true a legal conclusion couched as a factual allegation." *Id*. Thus, "[a] pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement." *Id*. (internal quotation marks, brackets, and citations omitted); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-57 (2007). In other words, "merely boilerplate and conclusory" assertions are not sufficient, and a party cannot use labels and buzzwords to "incant[]" elements of a claim, but must instead "bolster [its] allegations with sufficient supporting facts" to avoid dismissal. *Navo S. Dev. Partners, Ltd. v. Denton County Elec. Co-op., Inc.*, 669 F. Supp. 2d 747, 755 (E.D. Tex. 2009); *Byers v. Intuit, Inc.*, 600 F.3d 286, 297 (3d Cir. 2010).

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[3] When Kaiser filed its original Answer, Affirmative Defenses and Counterclaim (ECF No. 14) that contained antitrust and tortious interference claims, YETI responsively pled that Kaiser failed to state a claim upon which relief can be granted (ECF No. 19, p. 38, ¶ 181). YETI did not file a Rule 12(b)(6) motion then because the parties were engaged in settlement discussions.

Importantly, "[e]ach legal theory must be examined for its sufficiency and applicability, on the entirety of the relevant facts." *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1367 (Fed. Cir. 1999). Courts should dismiss a claim as a matter of law if it (1) "lack[s] [a] cognizable legal theory," or (2) contains "insufficient facts under a cognizable legal claim." *Seaboard Int'l, Inc. v. Cameron Int'l, Corp.*, No. 13-281, 2013 WL 3936889, at *2 (E.D. Cal. July 30, 2013).

Finally, in analyzing antitrust claims, "it is not proper to assume that the plaintiff can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged." *Chawla v. Shell Oil Co.*, 75 F.Supp.2d 626, 634 (S.D. Tex. 1999) (citing *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983)).

2. The Kaiser Defendants fail to plausibly plead the essential requirements of an illegal tying arrangement

The Kaiser Defendants allege that YETI has violated Section 3 of the Clayton Act by entering into an illegal tying arrangement. (ECF 67 at ¶¶ 179-187). Specifically, they allege that YETI has "refused to sell ... its cooler products to [a third party called "Academy"] unless Academy agreed to refrain from selling [Kaiser's] 'Boss' tumbler drinkware products ..." (ECF 67 at ¶ 181). Even if this were true, the Kaiser Defendants' allegations come nowhere close to satisfying the pleading standards under *Twombly* and the antitrust laws.

To establish an illegal tying claim under Section 3 of the Clayton Act, the Kaiser Defendants must prove: (1) two separate products, the "tying" product and the "tied" product; (2) sufficient market power in the tying market to coerce purchase of the tied product; (3) involvement of a not insubstantial amount of interstate commerce in the tied market; and (4) anticompetitive effects in

the tied market."[4] *Bob Maxfield, Inc. v. Am. Motors Corp.*, 637 F.2d 1033, 1037 (5th Cir. 1981)[5] (citing *Driskill v. Dallas Cowboys Football Club, Inc*., 498 F.2d 321, 323 (5th Cir. 1974)).

To get past the pleading stage, the Kaiser Defendants must plead factual support for each element; failure to plead facts needed to meet the elements of a tying claim requires dismissal of their claim. *Rockbit Indus. U.S.A., Inc. v. Baker Hughes Inc.*, 802 F.Supp.1544, 1550 (S.D. Tex. 1991). Here, the Kaiser Defendants fail to adequately plead at least the following tying elements: (1) that YETI has sufficient market power in the purported tying market; (2) that YETI's alleged agreement with Academy affected a "not insubstantial" volume of interstate commerce; and (3) that the alleged tie had an anticompetitive effect on the tied market. Because the Kaiser Defendants' antitrust allegations do not meet the pleading requirements for an illegal tying arrangement, it must be dismissed. *Twombly*, 550 U.S. at 555-57; *Iqbal*, 556 U.S. at 678.

a. The Kaiser Defendants fail to allege an "anticompetitive effect" on the tied market

Taking the last element first, the Kaiser Defendants fail to allege any "anticompetitive effect." A tying arrangement may have an anticompetitive effect only if it has "had an actual adverse effect on competition." *Breaux Bros. Farms, Inc. v. Teche Sugar Co., Inc.*, 21 F.3d 83, 86 (5th Cir. 1994) (citing *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 31 (1984)). Mere "speculation about anticompetitive effects is insufficient," and the plaintiff must "show

[4] Courts over time have moved from analyzing tying claims under the *per se* rule to analyzing them under the rule of reason. The Fifth Circuit has adopted a single test that uses elements from both. *Bob Maxfield, Inc. v. Am. Motors Corp.*, 637 F.2d 1033, 1037 (5th Cir. 1981); *Rockbit Indus. U.S.A., Inc. v. Baker Hughes Inc.*, 802 F.Supp.1544, 1549 (S.D. Tex. 1991).

[5] In *Bob Maxfield*, although the plaintiff brought antitrust claims under both Section 1of the Sherman Act and Section 3 of the Clayton Act, the Court evaluated the claims under a single analysis because the "two theories of liability are substantively synonymous." *Id*; *see also Chawla* 75 F.Supp.2d at 644-45 (the sufficiency of pleadings under § 1 of the Sherman Act and § 3 of the Clayton Act are "virtually the same.").

that the tie as it actually operated in the market harmed competition." *Roy B. Taylor Sales, Inc. v. Hollymatic Corp.*, 28 F.3d 1379, 1385 (5th Cir. 1994) (internal citations removed).

Thus, allegations of harm to competitors alone are insufficient. *See Rockbit*, 802 F.Supp. at 1551 (even if anticompetitive conduct were aimed at defendant, "there would be no claim because the antitrust laws are concerned with injury to competition, not competitors"); *see also Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc.*, 429 U.S. 477, 488 (1977). Indeed, the Supreme Court has long recognized that the purpose of the Clayton Act is "the protection of competition, ***not competitors***." *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 320 (1962) (emphasis added). As the Fifth Circuit explained:

> The purpose of antitrust law is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. ***The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.*** It does so not out of solicitude for private concerns but out of concern for the public interest.

In re Pilgrim's Pride Corp., 728 F.3d 457, 462 (5th Cir. 2013) (emphasis added) (citing *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993)). Here, the Kaiser Defendants allege harm to at most one competitor—Kaiser. The Kaiser Defendants do not allege any harm to overall competition, much less any facts that could possibly support finding an adverse effect on competition.

Nor can the Kaiser Defendants make out a case of harm to competition based on the alleged tying conduct. The Kaiser Defendants allege that YETI has foreclosed them from selling its "Boss" tumbler drinkware products to a third party retailer, Academy, because of a tying arrangement. (ECF 67, at ¶ 181). But Courts have determined this is not the type of conduct that can be considered to cause harm to competition. Where "a manufacturer is foreclosed from selling ***to a dealer*** because of a tying arrangement, competition is not adversely affected if the

manufacturer will be likely to find another way to take its products to market." *Wilson v. Mobil Oil Corp.*, 984 F.Supp. 450, 463 (E.D. La. 1997) (*citing Roy B. Taylor Sales*, 28 F.3d at 1379) (emphasis added). Stated differently, competitors "do not lose a segment of the tied market if there are genuine alternative paths to consumers." *Roy B. Taylor Sales*, 280 F.3d at 1383. It is not necessary that the number of alternative distributors be high, but only that they exist. *Id.* Thus, arrangements that only constrain dealers, and where consumers may go elsewhere to purchase the goods separately, "create relatively little danger to competition." *Id.* Put simply, a substantial anticompetitive effect in the relevant market will not be found where "there is no ultimate foreclosure to the consumer of a choice of goods." *Wilson*, 984 F.Supp. at 463.

That is precisely the case here. The Kaiser Defendants do not allege that YETI's conduct has or could prevent the Kaiser Defendants from competing; that YETI's conduct has or could prevent the Kaiser Defendants from using other paths to take their drinkware products to market; or that YETI's conduct has or could prevent consumers from purchasing Kaiser's products.

Rather, the Kaiser Defendants' allegations suggest the opposite inference: that YETI's conduct has not caused any of the above harm. YETI's alleged tying arrangement merely limits one of Kaiser's many drinkware products (its "Boss" tumblers) from being sold by a single vendor (Academy) that has stores in a limited geographic region of the United States (15 states). (van Es Dec. at Exs. 14-15). Kaiser cannot reasonably claim that this narrow restriction on a single product line and a single retailer somehow precludes Kaiser's ability to compete. Indeed, Kaiser asserts that it is "one of the largest suppliers of stainless, acrylic, and ceramic drinkware in the United States" and has "manufactured many millions of drinkware items [that it] has sold and ***continues to sell*** in all markets, including retail, promotional, and licensed sports." (ECF 67 at ¶¶ 20, 27 (emphasis added)). And Kaiser's website boasts numerous varieties of drinkware

products. (van Es. Dec. at Ex. 15) ("Thermo-Steel manufactures [a] wide variety of stainless, acrylic, aluminum and ceramic items. We have … a wide variety of designs [and] the capability[y] to supply you with any custom order of stainless, bottles, acrylic or ceramic drinkware."). In short, the alleged tying arrangement does not eliminate or even impair Kaiser's ability to reach its consumers.

Also missing in the Kaiser Defendants' count is any allegation that its consumers are somehow harmed by YETI's alleged conduct. When viewing the effect of antitrust claims on competition, a key consideration "is ultimate harm to consumers." *Chawla*, 75 F.Supp.2d at 636. Indeed, courts have noted that "[u]ltimately, the consumer is the beneficiary." *Roy B. Taylor Sales*, 28 F.3d at 1382 (finding no illegal tying arrangement where plaintiff did "not claim that [defendant] limited the choices available to consumers."). The alleged tying arrangement here does not restrict consumers from having access to drinkware products whether they are from any other competitor, Kaiser's other drinkware products, or even the particular "Boss" tumblers in question. Stated differently, consumers looking for Kaiser's infringing "Boss" products can currently purchase them through Kaiser's numerous other sales channels, and consumers looking for Kaiser's other products can continue to purchase them through any of Kaiser's sales channel. In short, consumers are not limited in their choice of drinkware products. Because the Kaiser Defendants have not alleged that consumers are somehow affected by the alleged tying arrangement, it cannot be said to restrain competition.[6] *See United Farmers Agents Ass'n, Inc. v.*

[6] To the contrary, YETI's alleged conduct can be considered pro-consumer in that it serves to avoid consumer confusion in the marketplace as to the source of certain goods. *See Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 854 n.14 (1982) (recognizing that trademark infringement "inhibits competition" by "depriv[ing] consumers of their ability to distinguish among the goods of competing manufacturers.").

Farmers Ins. Exchange, 89 F.3d 233, 236-37 (5th Cir.1996) (rejecting antitrust claims because it "ha[d] nothing to do with … ultimate consumers.").

The Kaiser Defendants' antitrust claim should be dismissed because it fails to allege an anticompetitive effect on the tied market.[7]

b. The Kaiser Defendants fail to allege that YETI has "market power" in the tying market

The Kaiser Defendants also fail to allege that YETI has "market power." The Supreme Court has made clear that "in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product." *Illinois Tool Works, Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 46 (2006). Market power is the "special ability ... to force a purchaser to do something he would not do in a competitive market." *Jefferson Parish*, 466 U.S. at 13-14. "Mere conclusory language restating the requisite elements of a tying claim, without any factual specificity, is insufficient to make out the market power element of a tying claim." *Rockbit*, 802 F.Supp. at 1550 (citing *Mountain View Pharmacy v. Abbot Labs.*, 630 F.2d 1383, 1387 n. 4 (10th Cir. 1980)). In determining whether a plaintiff has sufficient market power, courts have considered factors such as "strength of the competition, probable development of the industry, the barriers to entry, the nature of the anticompetitive conduct, and the elasticity of consumer demand." *Ginzburg v. Memorial Healthcare Sys., Inc.*, 993 F.Supp. 998, 1026 (S.D. Tex. 1997).

[7] The Kaiser Defendants have also failed to allege "injury in fact" to anyone other than Kaiser itself. *See* 15 U.S.C. § 15 ("Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore…."); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 111 (1986) (finding that for proper standing the "plaintiff[s] must still allege an injury of the type the antitrust law were designed to prevent."). The Kaiser Defendants' fail to allege any injury to any of the remaining Kaiser Defendants: (i) Titan Custom Products, Inc.; (ii) The Allen Company, d/b/a Allen Color Craft; (iii) Ad Ideas Of Wisconsin, Inc., d/b/a Zipline, d/b/a Image Innovators, or (iv) Benner China and Glassware of Florida, Inc.

The Kaiser Defendants do not allege any of these factors. Nor do they allege any facts that could plausibly support that YETI has market power in coolers sufficient to force enough purchasers to change their drinkware purchases such that YETI would foreclose competitors and gain market power in drinkware.[8]

The Kaiser Defendants' antitrust claim should be dismissed because it fails to allege that YETI has ***any*** market power, much less market power sufficient for a tying claim.

c. Kaiser Defendants fail to allege that the alleged tie affects a "not insubstantial volume of commerce" in the tied market

Even if the Kaiser Defendants had adequately pled anticompetitive conduct and market power in the tying product, their claim would still fail. A tying arrangement is not illegal "unless a substantial volume of commerce is foreclosed thereby." *Rockbit*, 802 F.Supp. at 1550 (citing *Jefferson Parish*, 466 U.S. at 15) (granting motion to dismiss a tying claim because plaintiff "failed to allege any facts which would indicate the degree of commerce that may have been foreclosed by the alleged tying arrangement.").

The Kaiser Defendants do not allege that YETI's alleged conduct is affecting a substantial amount of commerce. Nor have they alleged any facts that could support such a contention. If anything, the Kaiser Defendants' allegations support the opposite inference: that an insubstantial volume of commerce has been affected.

The Kaiser Defendants have only alleged conduct as to a single retailer—Academy. They have not alleged that YETI's conduct has foreclosed Kaiser's ability to sell its drinkware products through other retailers or distribution channels. This alone warrants dismissal. *See, e.g.*, *Jefferson Parish*, 466 U.S. at 16 ("If only a single purchaser were 'forced' with respect to the

[8] The Kaiser Defendants make passing reference that YETI's coolers are patented. (ECF 67, at ¶ 63). But the mere fact that an alleged tying product is patented does not support a presumption of market power. *See Ill. Tool Works*, 547 U.S. at 45

purchase of a tied item, the resultant impact . . . would not be sufficient to warrant the concern of antitrust law."); *Sambreel Holdings LLC v. Facebook, Inc.*, 906 F.Supp.2d 1070, 1080-81 (S.D. Cal. 2012) (granting a motion to dismiss a tying claim when the complaint failed to allege that the purchase of the tying product from defendant "precluded the use of any [] products except [plaintiff's] in the alleged 'tied' market."); *Posa, Inc.v. Miller Brewing Co.*, 642 F.Supp. 1198, 1209 (E.D.N.Y.1986) (finding that the sale of the tying product conditioned on the distributors not using a particular supplier in the tied market was not a violation of antitrust claims, particularly where the distributors remained free to use other suppliers in tied market).

The Kaiser Defendants' allegations suffer from additional deficiencies. For example, the Kaiser Defendants allege the tied product market here is "drinkware products" and that the geographic market is the United States. (ECF 167 at ¶¶ 180-83). But Academy operates retail stores in only 15 states in the southeast region of the United States.[9] (van Es Dec. at Ex. 14). That represents but a fraction of the United States territory (the alleged relevant geographic market). The Kaiser Defendants thus fail to allege any facts showing how YETI's conduct has affected them in the remaining 35 states in the alleged geographic market.

As another example, the Kaiser Defendants only allege that YETI's conduct has foreclosed them from selling their "Boss" branded drinkware products to Academy. They do not allege that that Kaiser is foreclosed from either (i) selling its 'Boss' tumblers to other retailers or distribution channels, including in markets served by Academy stores; or (ii) selling its many

[9] The Court can take judicial notice of Academy's store locations through its website: www.academy.com/shop/storelocator. *See, e.g., In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 568 F. Supp. 2d 349, 352 n. 1 (S.D.N.Y. 2008) ("In reviewing a Rule 12(b)(6) motion, the court may consider . . . facts of which judicial notice may properly be taken under Rule 201 of the Federal Rules of Evidence.").

other drinkware products to Academy, which currently sells hundreds of products in its "Beverage Container" category. (van Es Dec. at Ex. 16).

Perhaps most important, the Kaiser Defendants do not even make any allegation suggesting that YETI has affected the sales options for any of the hundreds of other manufacturers of drinkware products. To have any material effect on competition in drinkware products, YETI would have to foreclose many other manufacturers from reaching customers through the innumerable retail and online outlets available.

In short, the totality of the Kaiser Defendants' allegations amounts to conduct that affects a single product (from numerous such products in the relevant product market) that is sold by a single retailer (operating in a subset of the relevant geographic market). It is impossible to see how YETI's alleged conduct could plausibly affect a substantial amount of interstate commerce. And the Kaiser Defendants have failed to allege any facts suggesting otherwise. Their complete lack of a factual basis for this element supports dismissing their tying claim.

B. The Court should sever/stay the antitrust and tortious interference counterclaims (20th – 22nd Counterclaims)

To the extent the Court does not outright dismiss the Kaiser Defendants' antitrust counterclaim, it should at least sever and stay this counterclaim, as well as the tortious interference counterclaims, pending the resolution of the underlying trade dress/trademark infringement litigation. Rule 42(b) allows the Court to order a separate trial of claims, counterclaims, or issues "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy." *TDC Elecs., Inc. v. Jack B. Harper Contractor,* No. 91-2407, 1992 WL 32284, at *1 (E.D. La. Feb. 7, 1992); *Amado v. Microsoft Corp.*, 517 F.3d 1353, 1358 (Fed. Cir. 2008) (courts have "the authority to decide the order in which they hear and decide issues").

For example, it is "standard practice" for courts to sever and stay antitrust claims until after the trial of intellectual property claims. *See, e.g.*, *TDC Elecs.*, 1992 WL 32284, at *1 ("Many courts" bifurcate patent and nonpatent claims, "particularly when antitrust claims are involved," and bifurcation in patent cases "has long been approved of by the Fifth Circuit"); *Monarch Marking Sys., Inc., v. Duncan Parking Meter Maint. Co., Inc.*, No. 82-2599, 1986 WL 3625 at *3 (N.D. Ill. Mar. 13, 1986) (severing and staying antitrust claims from trademark and patent claims); *In re Innotron Diagnostics*, 800 F.2d 1077, 1084 (Fed. Cir. 1986) (discussing the "now-standard practice of separating for trial patent issues and those raised in an antitrust counterclaim") (severing and staying antitrust claim based on part on alleged "illegal tie-in"); *Eurand Inc. v. Mylan Pharm.*, No. 08-889, 2009 WL 3172197, at *2 (D. Del. Oct. 1, 2009) (severing and staying antitrust claims); *see also SCFC ILC, Inc. v. Visa U.S.A. Inc.*, 801 F.Supp. 517, 528-29 (D. Utah 1992) (bifurcating trademark infringement and unfair trade practice claims from antitrust claims, so court could focus decision on the issues that were the "focus[]" of the case).

There is good reason for this: the Kaiser Defendants' antitrust counterclaim shares little in common with the primary trademark/trade dress infringement case and it raises complex, distinct issues. Indeed, to succeed on its antitrust counterclaims, the Kaiser Defendants will have to define the relevant product and geographic markets, establish YETI has sufficient market power in the cooler market, demonstrate that the conduct affected a not insubstantial amount of interstate commerce in the drinkware product market, and show anticompetitive effects in the drinkware product market. *See Bob Maxfield*, 637 F.2d at 1037. These complex issues are irrelevant to the protectability and infringement of YETI's trademark and trade dress rights.

In this scenario, courts frequently find the benefits of fully severing and staying an antitrust counterclaim based on allegations of tying. *See, e.g.*, *Pharmacia, AB v. Hybritech, Inc.*, No. 84-699, 1984 WL 1479, at *2 (S.D. Cal. Oct. 19, 1984) (granting severance and stay of tying counterclaim "because separate, unrelated questions are presented by [antitrust] claims. The witnesses and documentary proof will necessarily be different [and] the antitrust claims will require extensive discovery."); *Masimo Corp. v. Philips Elecs. N. Am., Corp.*, No. 09-80, 2010 WL 925864, at *2 (D. Del. Mar. 11, 2010) (granting severance and stay of tying counterclaim because of interest in juror comprehension and judicial efficiency) ("If [the] antitrust counterclaims are tried at the same time, the jury will have to consider, at a minimum, intricate factual and economic analyses," and "[m]ajor antitrust litigation is often enormously time-consuming"); *Simpson v. Stand 21, S.A.*, No. 93-428, 1994 WL 735936, at *1-2 (N.D. Ind. Sept. 1, 1994) ("The Court finds that a separate trial of the additional counterclaims/third-party claims will foster judicial economy and convenience. These claims involve issues, evidence and witnesses distinct from those relevant to the patent claims" and "could substantially delay the resolution of the patent issues"). Accordingly, if the Court does not outright dismiss the Kaiser Defendants' antitrust counterclaim, severing and staying it will avoid costly and unnecessary discovery and motion practice.

At the same time, the Kaiser Defendants' tortious interference counterclaims rely in part upon the Kaiser Defendants' allegation that YETI has "lodge[d] baseless assertions of trade dress infringement" against various companies utilized by the Kaiser Defendants. Thus, these counterclaims are hinged on the primary issue of whether YETI's alleged assertions of trade dress infringement were baseless. Since resolution of this primary issue may render moot the Kaiser Defendants' tortious interference claims, these claims should be severed and stayed

pending resolution of YETI's trade dress claims. *See, e.g.*, *Eurand*, 2009 WL 3172197, at *2 (severing and staying because the "anti-trust … claims may be rendered moot by resolution of the patent" issues, while the antitrust "evidence is largely, if not totally, irrelevant to" the patent issues); *Monsanto Co. v. Syngenta Seeds, Inc.*, No. 04-305, 2006 WL 7204491, at *1 (D. Del. Nov. 8, 2006) (granting stay because there was "at least a minimal overlap between the patent case and the antitrust case," and the outcome of the patent case "necessarily will affect the complexion of the antitrust case to some extent").

IV. CONCLUSION

The Kaiser Defendants' unsupported counterclaims are merely an attempt to distract from the Kaiser Defendants' blatant infringement of YETI's trademark and trade dress rights. The Court should grant YETI's motion and (1) dismiss the Kaiser Defendants' antitrust counterclaim (22nd Counterclaim); and (2) sever and stay their antitrust counterclaim, to the extent it is not dismissed, as well as their tortious interference counterclaims (20th – 21st Counterclaims).

Dated: May 26, 2016

By: /s/ J. Pieter van Es

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CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2016, I caused the foregoing document to be electronically filed with the Clerk of the court pursuant to the Electronic Filing Procedures and using the CM/ECF system, and that a true and correct electronic copy was thereby caused to be served upon all counsel of record in this matter. The foregoing will be sent by courier on May, 27, 2016, onto the following:

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